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NO. 33253-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JASON SPAULDING,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY

The Honorable Brent Basden, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court abused its discretion when it denied appellant Jason Spaulding's request for a Special Sex Offender Sentencing Alternative (SSOSA) disposition.

2. The sentencing court erred when it concluded Mr. Spaulding was statutorily ineligible for a SSOSA.

3. The sentencing judge failed to properly exercise his discretion when he denied Mr. Spaulding's request for a SSOSA pursuant to RCW 9.94A.670.

4. To the extent it is a finding of fact, the court erred in finding:

Mr. Spaulding and the victim in this matter did not have an established relationship as required under RCW 9.94A.670(2)(e).

Memorandum Opinion, ¶ 3; Clerk's Papers (CP) 157.

5. To the extent it is a finding of fact, the sentencing court erred in finding:

Inherent in the concept of an "established relationship" is the passage of time. In other words, an "existing relationship" is different from an "established relationship." There was some kind of existing relationship, but it was not an established relationship. For purposes of RCW 9.94A.670, the court finds that an established relationship is not created by a few phone calls and social medial contacts over a few days, followed by in person contact for a few hours prior to the commission of the crime.

Memorandum Opinion, ¶ 4; CP 157.

6. To the extent it is a finding of fact, the sentencing court erred in finding that Mr. Spaulding is not amenable to SSOSA treatment and that he invalidated part of the testing by giving inconsistent responses.

Memorandum Opinion, ¶ 5; CP 158.

7. To the extent it is a finding of fact, the sentencing court erred in finding that Mr. Spaulding's "inability to accurately report and understand his actions create a risk to the community."

Memorandum Opinion, ¶ 6; CP 158.

8. The appellant's Judgment and Sentence contains legal financial obligations, including interest accrual and Department of Corrections supervision fee, that are no longer authorized following *State v. Ramirez*¹ and after enactment of House Bill 1783.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where an appellant messaged with the victim K.M. via Facebook Messenger over the course of four days, and where the victim met the appellant for the first time several hours before the offense, and where the victim was in the process of moving into the appellant's house, is there a "connection to" or an "established relationship" with the victim so as to qualify for SSOSA as required by RCW 9.94A.670(2)(e)? Assignments of Error 1, 2, 4, and 5.

2. Did the sentencing judge fail to exercise the discretion vested in

¹191 Wn.2d 732, 747, 426 P.3d 714 (2018).

him by statute when he found that Mr. Spaulding did not accurately report his past, was confused about events and their sequence, did not understand his actions and did not accurately report his actions to the SSOSA evaluator, and that he was therefore not amenable to SSOSA treatment? Assignments of Error 3, 6, and 7.

3. Should the case be remanded to the trial court to strike the interest accrual provision and community supervision fee that are no longer authorized after enactment of House Bill 1783? Assignment of Error 8.

C. STATEMENT OF THE CASE

1. Procedural facts:

Jason Spaulding was charged with one count of second degree rape and one count of fourth degree assault on August 15, 2018. Clerk's Papers (CP) 300. According to the affidavit of probable cause, K.M., an adult female, reported to police that Mr. Spaulding contacted her on August 1, 2018 using Facebook Messenger, a messaging app, and that they messaged with each other several times until August 4, 2018. CP 309-10. K.M. and Mr. Spaulding had not previously met, but had mutual friends. CP 309.

On the morning of August 8, 2018, Mr. Spaulding and K.M. were both at an apartment in Port Angeles and met in person for the first time. CP 309. K.M. went with Mr. Spaulding in his car, along with Charles Creed, Carson Tholt, and Sarah Roberts, and drove to Sequim. CP 309.

Mr. Spaulding drove K.M., Mr. Creed, Mr. Tholt, and Ms. Roberts to

Mr. Spaulding's house near Port Angeles. CP 309. On the way stopped at a Walmart where Mr. Spaulding bought makeup, clothing, and other items for K.M. CP 309. K.M. told police that while at his house, Mr. Spaulding was touching her, grabbing her buttocks, and was "flirty." CP 309. K.M. told police she did not object to this because they were developing a relationship and that she was going to live with him. CP 309.

While at Mr. Spaulding's residence, they prepared a room in the house for K.M. to stay. CP 309. K.M. told police that Mr. Spaulding became more aggressive and threw her on the bed. CP 309.

In the afternoon, Mr. Creed and Ms. Roberts left the house to run an errand and Mr. Tholt was washing Mr. Spaulding's car. CP 309.

During this time, K.M. reported to police that Mr. Spaulding threw her onto a chair in the kitchen and used one hand to pull her top up, shoved the front of her top into her mouth and immobilized her arms above her head with his elbow. CP 309. She stated that he then pulled down her pants and raped her vaginally for about ten minutes. CP 309-10. K.M. said he was going to take a shower, and when he left the room she pulled up her pants and ran outside to Mr. Tholt while still topless and crying. CP 310. Mr. Spaulding came outside and K.M. was trying to act as if everything was okay. CP 310. She retrieved her top and her phone from the house and tried to leave the house on foot several times, and tried to flag down motorists for help, but each time she was brought back to the house by Mr. Spaulding. CP

310. Eventually Mr. Tholt and K.M. left together and again Mr. Spaulding came after them on foot and grabbed Mr. Tholt by the wrist. CP 310. Mr. Tholt got away and they ran to a nearby house where a man came out with a gun. CP 310. The man had Mr. Tholt and K.M. sit in his yard while he called 911. CP 310.

Following a defense motion for a competency evaluation under RCW 10.77, Mr. Spaulding was evaluated and determined to be competent to proceed to trial. CP 216, 250, 259, 274. The court entered an order of competency on December 28, 2018. CP 207.

Mr. Spaulding pleaded guilty on January 23, 2019, to an amended information of one count of indecent liberties with forcible compulsion. Report of Proceedings (RP)² at 86-99; CP 189, 200. Under the terms of the plea agreement, the State would recommend a SSOSA option if he was found to be eligible, and would recommend nine months of confinement followed by sex offender treatment. RP at 91; CP 193. If SSOSA was not granted, the State would recommend 57 months of confinement. RP at 91; CP 193.

Mr. Spaulding had a SSOSA evaluation by Dr. Michael Compte and was determined to be amenable to treatment. (Psychosexual Evaluation and Treatment Plan, March 31, 2019); CP 124-157.

²The record of proceedings is designated as follows: August 13, 2018, August 15, 2018, August 24, 2018, September 21, 2018, September 27, 2018, October 12, 2018, October 19, 2018, November 9, 2018, November 30, 2018, December 21, 2018, December 28, 2018, January 18, 2019, January 23, 2019 (change of plea hearing), March 7, 2019, March 27,

Community Corrections Officer Todd Lovell filed a Pre-Sentence Investigation on February 21, 2019. CP 164-178. Mr. Lovell stated in his report that Mr. Spaulding was ineligible for SSOSA:

1. A condition of SSOSA eligibility requires that: “There was an established relationship/connection to the victim other than that resulting from the crime.”

After extensive review of the official reports, it is clear that Mr. Spaulding and the victim had no previously established relationship/connection. Previous to the date of the offense, the same day the defendant and the victim first met face-to-face, interactions were limited to an exchange of messages over Facebook. In the Probable Cause statement, the victim stated that she believed that they were “developing a relationship,” which is reasonable evidence to show that their brief acquaintance with one another was not yet an established relationship.

Lack of an established relationship/connection between Spaulding and [K.M.] is the primary factor resulting in his disqualification for the SSOSA program.

CP 177.

2. Sentencing hearing

The matter came for sentencing on April 10 and April 17, 2019, the Honorable Brent Basden presiding. RP at 105-140.

Following clarification of Mr. Spaulding’s offender score, defense counsel asked the court to sentence him under SSOSA. RP at 116-121. The State also recommended SSOSA and argued:

While the contact between Mr. Spaulding and [K.M.] was not extensive, I do think it does meet the minimal threshold of having

2019, April 10, 2019 (sentencing), and April 17, 2019 (sentencing).

some prior relationship to the event. Mr. Spaulding and [K.M.] did not have previous conversations on line, they had met in the morning and then later on the day is when Mr. Spaulding attacked [her.]

RP at 112-13.

CCO Todd Lovell stated in his PSI that Mr. Spaulding was ineligible for SSOSA on the grounds that the CCO did not believe that Mr. Spaulding and K.M. had an “established relationship” or connection required by RCW 9.94A.670(2)(e). RP at 112; CP 164, 177.

The court denied the motion for SSOSA, finding that Mr. Spaulding was ineligible under the statute because he did not meet the requirement that he had an established relationship with the victim and that he would need to be amenable to treatment and that the report “raises serious questions about that and I would note that’s based on part inability to accurately describe and appreciate the crime by not admitting all aspects of the offense.” RP at 128-29.

Based on an offender score of “1”, Mr. Spaulding faced a standard range of 57 to 75 months. CP 94. The court imposed 66 months. RP at 129; CP 96.

The case was set over for finalization of sentencing on April 17, 2019. RP at 133-140. The court filed a Memorandum Opinion on April 17, 2019. CP 157-59. The Opinion states in part:

The court finds that Mr. Spaulding and the victim in this matter did not have an established relationship as required under RCW 9.94A.670(2)(e). They became aware of one another a few days prior

to the date of the crime, and in fact met in person for the first time on the date of the crime. On the day of the crime their relationship consisted, in large part, of him buying the victim gifts, promising her housing, and engaging in sexualized behavior leading up to the crime.

Inherent in the concept of an “established relationship” is the passage of time. In other words, an “existing relationship” is different than an “established relationship.” There was some kind of existing relationship, but it was not an established relationship. For purposes of RCW 9.94A.670, the court finds that an established relationship is not created by a few phone calls and social media contacts over a few days, followed by in person contact for a few hours prior to the commission of the crime.

CP 157-58.

The Opinion also states that Mr. Spaulding is not amenable to treatment, that he gave inconsistent responses, that there were concerns that he was not accurately reporting his past, and that he had an inability to accurately report and understand his actions, creating a risk to the community under RCW 9.94A.670(4). CP 158.

The court found that Mr. Spaulding did not have the ability to pay discretionary legal financial obligations. RP at 137. The court ordered a \$500 crime victim assessment. CP 98. The judgment and sentence provides that the “financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments.” CP 101. Appendix H of the judgment and sentence also provides that the defendant “shall pay supervision fees as determined by DOC.” CP 109.

Timely notice of appeal was filed on April 26, 2019. CP 13. This

appeal follows.

D. ARGUMENT

I. THE SENTENCING COURT ABUSED ITS DISCRETION BY FINDING THAT MR. SPAULDING WAS INELIGIBLE FOR SSOSA

The SSOSA, a special provision for certain qualifying sex offenders, provides an alternative sentence permitting community supervision and treatment in lieu of incarceration. A SSOSA allows certain first time sex offenders to receive a suspended sentence. RCW 9.94A.670. If a court finds that an offender is eligible for the alternative, it may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670(3). After receiving the reports, the court shall determine whether the alternative sentence “is appropriate.” RCW 9.94A.670(4).

The requirements for an offender's eligibility for a SSOSA sentence are set forth in RCW 9.94A.670(2). One of the requirements is that “the offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime....” RCW 9.94A.670(2)(e). In this case, the court abused its discretion by finding that Mr. Spaulding failed to meet this eligibility requirement.

Where a defendant has requested a sentencing alternative authorized by statute, a trial court's failure to consider that alternative is effectively a failure

to exercise discretion and is subject to reversal. See *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Whether Mr. Spalding is eligible for a SSOSA is a question of statutory interpretation, which is reviewed de novo. *State v. Landsiedel*, 165 Wn.App. 886, 269 P.3d 347 (2012) (citing *Dot Foods, Inc. v. Dept. of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009)). “Statutory interpretation is a question of law, subject to de novo review.” *City of Spokane v. Spokane County*, 158 Wn.2d 661, 672-73, 146 P.3d 893 (2006).

Very few Washington cases have discussed the meaning of the statutory phrase “established relationship or connection”. One case that addresses the statutory phrase “established relationship or connection” is *State v. Willhoite*, 165 Wn. App. 911, 268 P.3d 994 (2012). Willhoite was tried for possession of child pornography. *Id.* at 912. Willhoite had no relationship of any kind with any of the children depicted in the electronic images stored on his computer. *Id.* at 915. He argued in the trial court that there were no “victims” for his offense since there was nothing in the record about harm suffered by any of the children depicted in the images. *Id.* at 914. The trial court granted the SSOSA disposition, and the state appealed. *Id.* Division One reversed the sentence, reasoning that since the record established that Willhoite had no relationship of any kind with any of the children depicted in the images, he did not meet the statutory “relationship or connection” condition. *Id.* at 916. The court held that

the absence of a discernable victim did not eliminate the requirement and reversed and remanded for resentencing. *Id.*

In *State v. Landseidel*, 165 Wn. App. 886, 269 P.3d 347 (2012), the defendant was charged with attempted rape of a child in the second degree, and communicating with a minor for immoral purposes as a result of a police “sting” operation involving an internet chat room. *Id.*, at 888. The supposed minor person in the chat room was a police officer posing as a minor. *Id.* At sentencing he requested SSOSA and argued that his wife was a “victim” of the offense because their relationship had suffered harm as a result of his crime, and since he had an “established relationship” with her, he qualified for SSOSA. *Id.* The state agreed he had an “established relationship” but argued his wife was not a “victim” of this particular crime and that the defendant was misreading the legislative intent of the SSOSA statute. *Id.* Division One agreed, reasoning that “victim” in the case was limited to the person against whom the crime was committed, even if that was a fictitious person. *Id.* at 893.

These cases are not useful in providing guidance to this Court in reviewing the trial court's determination that Mr. Spaulding lacked an “established relationship or connection” to K.M, since in neither case was there an actual victim with whom to have a relationship or connection and because neither defendant had met a victim in person.

When interpreting a statute, courts must “give effect to the Legislature’s intent.” *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992); *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). The clearest indication of legislative intent is the language enacted by the legislature itself. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Because “[t]he surest indication of legislative intent is the language enacted by the legislature,” courts begin by attempting to ascertain the plain meaning of the statutory provision. *Ervin*, 169 Wn.2d at 820. This inquiry looks “to the text of the statutory provision in question, as well as ‘the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’ ” *Id.* (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). If the plain language is unambiguous, then the legislative intent is apparent from the language used, and the Court will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003); *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007). If the language of a statute is susceptible to multiple meanings, then a reviewing court may look to legislative history to determine the meaning of the statute. *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002). Plain meaning is “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166 Wn.2d

572, 210 P.3d 1007 (2009). In determining the plain meaning, courts are careful not to add words, and all the language of the statute must be given effect. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 80 P3d 598 (2003).

The rule of lenity applies only after unsuccessful application of the foregoing principles. *In re Pers. Restraint of Cruze*, 169 Wn.2d 422, 427–28, 237 P.3d 274 (2010).

The specific issue in dispute is whether the circumstances of communicating over the internet and then meeting K.M. in person on the day of the offense is an “established relationship” or “connection to” the victim. No statute further defines “established relationship” or “connection to” as used in the SSOSA statute.

Among the many meanings of “established” and “relationship,” Webster's Third New International Dictionary defines “establish” as “to make firm or stable” or “to bring into existence, create, make, start, originate, found, or build”. Webster's Third New International Dictionary, 813 (1961). Black's defines the verb “establish” as “[t]o make or form; to bring about or into existence.” Black's Law Dictionary 626 (9th ed. 2004). Webster's New College Dictionary defines “establish” as “to cause to be or happen; bring about.” Webster's New College Dictionary, 486 (2005).

Of the many definitions of the word “relationship,” Webster's New Collegiate Dictionary defines “relationship” as “a state of affairs existing between those having relations or dealings.” Webster's New Collegiate Dictionary 975 (1977). Black's defines “relationship” as “[a] particular type of connection existing between people related to or having dealings with each other.” Black's Law Dictionary, (retrieved September 30, 2019, from <https://www.thelawdictionary.org/relationship>).

The meaning of “established relationship” is susceptible to multiple meanings. The term “establish” may mean either a concept or occurrence of firm and long-standing duration, or that it has merely been created or put into effect without reference to a specific temporal requirement. Similarly, “relationship” may mean either a state of affairs of a long duration, or taking place during a shorter period of time. Because the term “established relationship” is subject to multiple meanings, the next step is to consult the legislative history.

The SSOSA has existed since 1984. Prior to 2001, the terms of a sentencing alternative for sex offenders were codified as part of the general sentencing statute. Former RCW 9.94A.120(8)(a)(ii) (2000). In July, 2001, the SSOSA was recodified as an independent statute. LAWS OF 2000, ch. 28, §§ 5, 20, 46; *State v. Osman*, 157 Wn.2d 474, 481 n. 6, 139 P.3d 334 (2006).

In 2004, the legislature added three provisions regarding a defendant's eligibility, including the requirement that the defendant have an “established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime.” RCW 9.94A.670(2)(e); LAWS OF 2004, ch. 176, § 4(2)(e).

The inclusion of a requirement that the victim have a relationship with the perpetrator furthered the original intent of the SSOSA statute, which was to encourage the reporting of sex offenses against children perpetrated by family members, with the expectation that the possibility of no prison time or a reduced prison sentence would make reporting of the offenses by family members more likely, thus further protecting children from sexual abuse. See *State v. Jackson*, 61 Wn.App. 86, 809 P.2d 221 (1991) (noting that one of the legislature's reasons for creating the sex offender sentencing alternative was because “providing alternatives to confinement had resulted in increased reporting of sex crimes, especially in the case of intrafamily abuse.”).

Allowing offenders who have known their victims for a relatively short duration to participate in SSOSA does not offend the legislative intent of the statute. The emergence of communication apps via Facebook Messenger, as well as a large number of other internet social media apps and platforms, accelerates the process by which people come in contact and form

relationships with each other. The internet has revolutionized the manner in which people meet with almost breathtaking rapidity. Defendants who initially come in contact with each other on the internet should not be precluded from receiving a SSOSA sentence.

This is not a case where the appellant did not know K.M. and did not interact with her until the actual offense. Mr. Spaulding had an overt connection to K.M. They had messaged each other over the course of four days, and then met in person on the morning of August 8, 2018. Moreover, the record shows the nature of their relationship was much more significant and entrenched than was found by the sentencing court. K.M. anticipated moving in with Mr. Spaulding, and evidently this was something they both discussed during the course of their Facebook messaging or at the apartment. They were in the process of preparing a room for K.M.'s use with the help of their mutual friends. CP 309.

The offense was not the type of sudden attack where the offender and victim had no interaction except for the offense itself. They met the morning of the offense, and spent time together in the apartment and in Mr. Spaulding's car. They travelled from Port Angeles to Sequim, went to Walmart, and then went to his house and started to prepare the room in order allow K.M. to move in. CP 309-10.

Moreover, under the rule of lenity, statutory ambiguity is resolved against the State and in favor of the defendant. *State v. Arndt*, 87 Wn.2d 374, 385, 553 P.2d 1328 (1976). Here, the term “established” is susceptible to multipole meanings: it can mean either an event or circumstance of a significant duration, but can also mean that something has been formed or created, regardless of the length of time it has existed. Similarly, a relationship may be of sort duration, or be long standing interaction.

The trial court erred in finding there was not an established relationship or connection between Mr. Spaulding and K.M. As there was a relationship that developed on August 8, 2018 prior to the offense. Mr. Spaulding was eligible for a SSOSA sentence. Mr. Spaulding's sentence should be reversed and the matter should be remanded for a new sentencing hearing.

2. THE EVIDENCE DID NOT SUPPORT THE SENTENCING JUDGE'S FINDINGS THAT MR. SPAULDING WAS UNABLE TO ACCURATELY REPORT AND UNDERSTAND HIS ACTIONS AND THAT HE IS NOT AMENABLE TO SSOSA TREATMENT

In addition to finding Mr. Spaulding ineligible for SSOSA, the court also found that Mr. Spaulding is not amenable to treatment. CP 157-58. The court found that his inability to accurately report and understand his actions create a risk to the community. CP158. The court noted that Mr. Spaulding gave inconsistent responses and there “were concerns about his accurately

reporting of his past and e was confused about events and the sequence of events.” CP 158.

The court, however, acknowledged that Mr. Spaulding admitted the elements of the crimes, but that he did not “admit all aspects of the crime.” CP 158.

Initially, the appellant may appeal the sentence imposed in this case as the appellant retains the availability of appellate review of a sentence that is based upon an erroneous legal conclusion or when the trial court abused its discretion in determining which sentence to apply. *State v. Willhoite*, 165 Wn.App. 911, 268 P.3d 994 (2012) (citing *State v. Kinneman*, 155 Wn.2d 272, 119 P3d 350 (2005)). The appellant is also permitted to challenge the underlying facts and legal conclusions by which a court applies the chosen sentencing provisions, and RAP 2.2(b)(6) allows appeal of a sentence that “includes provisions that are unauthorized by law.” *Id.* (citing *Kinneman*, 155 Wn.2d at 283 and *State v. Wood*, 117 Wn.App. 207, 70 P3d 151 (2003)); RAP 2.2(b)(6).

A court reviews the denial of a SSOSA for an abuse of discretion. *State v. Frazier*, 84 Wn.App. 752, 753, 930 P.2d 345, review denied, 132 Wn.2d 1007 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or for untenable reasons. *State*

v. *Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

The statute provides that after the court receives the required reports following examination of the defendant:

The court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section.

RCW 9.94A.670(4).

Here, the trial court placed predominant emphasis on Mr. Spaulding's perceived failure to accurately report the facts of the event and by denying penial penetration during the offense. RP at 120; CP 158.

The sentencing judge found that Mr. Spaulding was not amenable to treatment, finding that Dr. Compte made note of contradictions in his responses, and that "there were concerns about his accurately reporting of his past and he was confused about events and the sequence of events. CP 158. The court also found his "inability to accurately report and understand his actions create a risk to the community." CP 158.

The court's reservations about the evaluation center on Mr. Spaulding's

failure to acknowledge the rape alleged by K.M. RP at 127. There is no allegation that Mr. Spaulding was outright lying about the offense.³ Instead, the court indicated that Mr. Spaulding was minimizing the event by denying penile penetration of K.M. RP at 127; CP 157. The sentencing court's decision was manifestly unreasonable because Mr. Spaulding, although he may still be in denial about aspects of the offense and whether he in fact has a sexual deviancy problem, Dr. Compte concluded his report by stating "it would not be difficult for a sex offender treatment provider to convince him" that he has a sexual problem. CP 158. In his report, Dr. Compte concluded that Mr. Spaulding was amenable to treatment and presented a "fair prognosis." CP 138.

Moreover, the sentencing judge failed to consider the statutory factors supporting a SOSSA sentence; Mr. Spaulding had no other victims and was found to be amenable to treatment.

The sentencing judge's refusal to consider imposing a SOSSA sentence was an abuse its discretion. See *State v. McDougal*, 120 Wn.2d 334, 354, 841 P.2d 1232 (1992).

3. THE COURT ERRED IN IMPOSING THE INTEREST ACCRUAL AND SUPERVISION FEE

³A defendant's decision to lie during trial is a recognized ground for rejecting a request for a SSOSA sentence. *Frazier*, 84 Wn.App. at 754.

a. Recent statutory amendments prohibit discretionary costs for indigent defendants

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in Engrossed Second Substitute House Bill 1783, which modified Washington's system of LFOs and amended RCW 10.01.160(3) to prohibit trial courts from imposing criminal filing fees, jury demand fees, and discretionary LFOs on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, §§ 6, 9, 17. The amendments to the LFO statutes apply prospectively to cases pending on direct review and not final when the amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

a. Interest accrual and supervision fee

The record shows that at sentencing the court found Mr. Spaulding to be indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 76.

The legislative amendments to the LFO statutes prohibit sentencing courts from imposing interest accrual on the no restitution portions of LFOs. RCW 10.82.090(2)(a); *Ramirez*, 191 Wn.2d at 746-47. Our Supreme Court has held that the amendments apply prospectively to all cases pending on direct review and not final when the amendment was enacted. *Id.* at 747.

In Appendix H of the judgment and sentence, the court also directed Mr. Spaulding to pay a community supervision fee to the Department of Corrections. CP 109. The relevant statute provides that this is discretionary: “Unless waived by the court ... the court shall order an offender to ... [p]ay supervision fees as determined by the department.” RCW 9.94A.703(2)(d). For this reason, costs of community custody, including monitoring costs, are discretionary and are subject to an ability to pay inquiry. *State v. Lundstrom*, 6 Wn.App.2d 388, 396 n. 3, 429 P.3d 1116 (2018). Because Mr. Spaulding is indigent, this Court should strike this condition.

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E. CONCLUSION

This Court should find that Mr. Spaulding is statutorily eligible for a SSOSA and remand to the sentencing court for consideration of that sentence.

Mr. Spaulding also respectfully requests this Court to remand for resentencing with instructions to strike the discretionary costs of interest accrual and supervision fee.

DATED: October 2, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

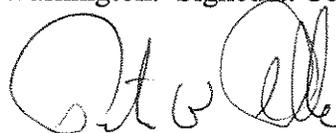
The undersigned certifies that on October 2, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Jesse Espinoza and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 2, 2019.



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